

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Saturn Telecommunications Services, Inc.,
Complainant,
v.
BellSouth Telecommunications, Inc.,
d/b/a AT&T Florida,
Defendant.
File No. EB-09-MD-008

ORDER ON RECONSIDERATION

Adopted: October 3, 2014

Released: October 7, 2014

By the Commission:

A. INTRODUCTION

1. In the Telecommunications Act of 1996, Congress established a process by which competitive providers of telecommunications service can negotiate and enter into agreements with the incumbent local telephone company to provide for interconnection with, and access to elements of, the incumbent's network. The parties in this case—Saturn Telecommunication Services, Inc. (STS) and BellSouth Telecommunications, Inc., d/b/a AT&T Florida (AT&T)—executed such an agreement in November 2006. The agreement included a dispute resolution clause that requires the parties to bring any disputes related to the agreement before the Florida Public Service Commission (PSC). A few days later, the parties entered into a settlement agreement in which STS released certain claims against AT&T. In this Order, we enforce the terms of the settlement agreement and the dispute resolution clause.

2. Specifically, this Order denies in its entirety a Motion for Reconsideration filed by STS, a competitive local exchange carrier (LEC) in Florida, in which STS seeks reconsideration of an Enforcement Bureau order that dismissed with prejudice STS's formal complaint (Complaint) against AT&T. In its Complaint, STS alleged that AT&T, a Florida incumbent LEC, unlawfully failed to negotiate the parties' interconnection agreement in good faith, refused to provide STS access to certain unbundled network elements (UNEs), and failed to migrate STS's customers to a special access facility in an appropriate manner. As discussed below, we affirm the Enforcement Bureau's ruling dismissing the Complaint. We find that the Enforcement Bureau correctly concluded that STS released all of the statutory claims raised in its Complaint under the terms of the settlement agreement. We further find that, to the extent STS contends that AT&T's failure to provide STS access to certain UNEs or migration processes violates the terms of the parties' interconnection agreement, STS may raise these claims before the Florida PSC pursuant to the forum selection clause in that agreement.

II. BACKGROUND

3. We briefly summarize below the facts relevant to STS's Motion for Reconsideration.¹ The Enforcement Bureau *Order*² dismissing STS's Complaint with prejudice³ contains a more complete discussion of the factual and legal background, and we incorporate herein by reference the entire *Order*.⁴

4. Subsection 251(c)(1) of the Act obligates incumbent LECs such as AT&T to "negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements to fulfill the duties described in" subsections 251(c)(2) and (3), among others.⁵ Subsections 251(c)(2) and (c)(3) obligate incumbent LECs, "in accordance with the terms and conditions of the agreement," to provide interconnection and access to UNEs "at any technically feasible point."⁶ Section 252, which establishes procedures for state commissions to negotiate, arbitrate and approve Section 251(c) agreements, permits carriers to "negotiate and enter into a binding agreement . . . without regard to the standards set forth in [Section 251(c)]."⁷

5. The Commission has released two orders implementing Sections 251(c) and 252 of the Act that are relevant to this proceeding. First, in the 2003 *Triennial Review Order (TRO)*, the Commission concluded that incumbent LECs must permit competitive LECs to commingle UNEs with wholesale services, including interstate access services.⁸ Second, in the 2005 *Triennial Review Remand Order (TRRO)*, the Commission determined that incumbent LECs were no longer required under Section 251(c)(3) to provide unbundled access to the combined local loop, switch and transport UNE platform (UNE-P).⁹

6. Prior to the *TRRO*'s release, STS and AT&T were parties to an interconnection agreement under which STS served its residential and small business customers by leasing UNE-P from AT&T. In early 2005, in anticipation of the *TRRO*'s elimination of UNE-P, STS and AT&T began discussing reconfiguring STS's network. In the course of these discussions, AT&T offered STS a special

¹ STS's Appeal for Full Commission Review or in the Alternative Motion for Reconsideration, (May 2, 2013) (on file in EB-09-MD-008) (Motion for Reconsideration or Motion). STS filed its Motion for Reconsideration pursuant to Section 405(a) of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 405(a), and Sections 1.106 and 1.302 of the Commission's rules (Rules), 47 C.F.R. §§ 1.106 and 1.302. See Motion for Reconsideration at 3, 6-7. Because STS requests full Commission review, *id.*, and because Section 1.302 of the Rules, which governs appeals from a presiding officer's ruling in a hearing, does not apply here, the Enforcement Bureau correctly treated the Motion for Reconsideration as filed under Section 405(a) of the Act, and referred it to the Commission pursuant to Section 1.106 of the Rules.

² *Saturn Telecommunications Services, Inc. v BellSouth Telecommunications, Inc. d/b/a AT&T Florida*, Memorandum Opinion and Order, 28 FCC Rcd 4335 (Enf. Bur. 2013) (*Order*).

³ Formal Complaint (July 20, 2009) (on file in EB-09-MD-008) (Complaint or Compl.). STS filed its Complaint under Section 208 of the Act, 47 U.S.C. § 208.

⁴ To the extent STS's Motion simply repeats arguments that were addressed fully in the *Order*, we decline to revisit all such arguments here. We thus deny such arguments for the reasons stated in the *Order*.

⁵ See 47 U.S.C. § 251(c)(1).

⁶ See 47 U.S.C. §251(c)(2) (interconnection) and (c)(3) (access to UNEs).

⁷ 47 U.S.C. § 252(a)(1).

⁸ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978, 17343-44, paras. 579-81 (2003), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

⁹ See *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2537, 2641-42, paras. 5, 199 (2005), *aff'd*, 450 F.3d 528 (D.C. Cir. 2008).

access transport facility called a “SmartRing.”¹⁰ AT&T initially stated that STS’s UNE-P customers could be connected to the SmartRing with relatively inexpensive UNE loops called “non-designed” DS-0 loops, or SL1 loops.¹¹ After STS entered into an agreement to purchase the SmartRing, however, AT&T changed its position. AT&T informed STS that it was not technically feasible to commingle SL1 loops with special access transport facilities such as the SmartRing, and that STS therefore would have to lease more expensive UNE loops from AT&T called “designed” DS-0 loops, or SL2 loops.¹² AT&T also informed STS that it had not created a bulk migration process to convert STS’s UNE-P customers to the kind of commingled network STS had chosen.¹³ After further discussions with AT&T, STS became concerned that AT&T had no conversion process for transitioning STS’s embedded base of UNE-P customers to the commingled network.¹⁴

7. In June 2006, STS filed a petition with the Florida PSC and comments in a proceeding before this Commission (collectively, the *2006 Proceedings*) complaining, among other things, that AT&T refused to commingle SL1s with STS’s SmartRing.¹⁵ STS asserted that AT&T’s refusal to allow SL1 commingling in accordance with the original network design violated the *TRO*,¹⁶ was fraudulent, deceptive, in bad faith, and aimed at driving STS out of business.¹⁷ STS also alleged that AT&T violated

¹⁰ See Compl. at 7, 14, paras. 22, 25–26; Further Revised Joint Statement of Undisputed Facts at 7, para. 22 (July 16, 2010) (on file in EB-09-MD-008) (Joint Statement).

¹¹ See *Order*, 28 FCC Rcd at 4338 & n.23 (explaining that the parties generally use the terms “non-designed DS-0 loop,” “non-designed loop,” “UCL-ND loop,” and “SL1 loop” interchangeably).

¹² See Joint Statement at 13–15, paras. 51, 53, 57, 63. Commingling is the linking of a UNE such as an SL2 loop “to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC” such as a special access transport facility like the SmartRing. See 47 C.F.R. § 51.5 (defining “commingling”).

¹³ See, e.g., Joint Statement at 15–16, para. 64.

¹⁴ See, e.g., Compl. at 26–27, paras. 66–70.

¹⁵ See Compl., Samry Aff., Ex. 2 (Emergency Petition of [STS] against [AT&T] to Require [AT&T] to Honor Commitments and to Prevent Anticompetitive and Monopolistic Behavior, Docket No. 060435-TP) (*FPSC Complaint*); *id.*, Samry Aff. Ex. 3 (STS Comments filed in *Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corp.*, WC Docket No. 06-74) (*FCC Comments*).

¹⁶ See *FPSC Complaint* at 4, para. 5 (AT&T is in breach of the *TRO*’s commingling requirements); *id.* at 14, para. 49 (AT&T’s refusal to commingle SL1s with special access facilities is “arbitrary” and violates the *TRO*), 16, para. 58 (STS was damaged by AT&T’s “misrepresentations and failure to comply with the FCC’s *TRO* [commingling requirements]”); *id.* at 16, para. 62 (the Commission “require[s]” the commingling of SL1s with special access transport, and AT&T’s “refusal” to provide STS with SL1s “is a violation of the *TRO*”); *FCC Comments* at 13, para. 41 (the Commission “require[s]” commingling of SL1s with special access facilities); *id.* at 13, para. 43 (AT&T’s commingling rules “unfairly restrict competition” and its refusal to allow SL1 commingling violates the *TRO*).

¹⁷ See, e.g., *FCC Comments* at 12–13, paras. 39–40 (AT&T’s bad faith violates the directives in the *TRRO* regarding negotiation of interconnection agreements); *id.* at 13–14, para. 43 (AT&T’s “refusal” to provide SL1s to STS was aimed at driving STS out of business and “fraudulent”); *id.* at 15, para. 45 (AT&T “resorted to fraud” to prevent STS from “timely transitioning its embedded base” of customers); *id.* at 15, para. 47 (AT&T “has no regard for the regulations of this Commission” and exhibits “flagrant disregard for the law”); *id.* at 16, para. 49 (“[AT&T]’s business plan is to suppress and eliminate competition, by any means, without concern for the legality of the method. The fact that [AT&T] would go to such extremes to eliminate competition from [STS] should serve as a warning”); *FPSC Complaint* at 5, para. 5 (AT&T made “false and fraudulent misrepresentations”); *id.* at 14, paras. 49–51 (AT&T’s “arbitrary” refusal to provide SL1s, “in violation of the FCC’s *TRO*,” is “anticompetitive, attempting by false representation to unfairly drive a competitor out of business”); *id.* at 15, para. 54 (“[AT&T]’s misrepresentations as above-stated in this [*FPSC Complaint*] were either intentional or done with reckless disregard for the truth[], . . . and made with the intended or expected result that the higher cost [of SL2s] would drive STS out of business”); *id.* at 16, para. 61 (accusing AT&T of “bad faith”); *id.* at 17, para. 64 (AT&T’s conduct is “[u]nfair . . . unconscionable . . . and . . . deceptive.”).

the *TRRO* by failing to provide bulk migration or some other method of migrating STS's UNE-P base of customers in a timely and profitable manner.¹⁸

8. In July 2006, the parties mediated and agreed to settle their dispute.¹⁹ The mediation resulted in the parties' execution of a term sheet (Term Sheet) on July 12, 2006, in which: (1) the parties agreed to negotiate a new interconnection agreement; (2) AT&T agreed "that STS will be able to convert 2500 UNE-P lines to SL2 loops commingled with special access transport"; (3) STS agreed to withdraw its petition before the Florida PSC and to withdraw its *FCC Comments*; and (4) the parties agreed that after they executed a new interconnection agreement they would release all claims, known or unknown, against each other "relating to" STS's petition before the Florida PSC.²⁰

9. In November 2006, STS and AT&T entered into a new interconnection agreement (ICA).²¹ The parties agree that the ICA does not obligate AT&T to provide SL1 commingling, but disagree as to whether it obligates AT&T to provide bulk migration.²² In accordance with the Term Sheet, a few days later STS and AT&T entered into a settlement agreement (Settlement Agreement), which states:

STS agrees not to re-file the [2006 Proceedings] or the allegations raised in or associated with [2006 Proceedings] at the [Florida PSC, the FCC] or in any other forum.²³

The Settlement Agreement also contains a release (Release), which states: "STS releases, acquits, and discharges [AT&T] from all Demands, Actions and Claims, whether known or unknown, asserted or which could have been asserted, against [AT&T] related to the [2006 Proceedings]."²⁴ The term, "Demands, Actions, and Claims" is defined to include:

[A]ll obligations, . . . controversies, suits, actions, causes of action, . . . claims, demands [and] rights . . . of any kind or sort whatsoever or howsoever or whenever arising . . . that relate to the claims set forth by STS in the [2006 Proceedings].²⁵

¹⁸ *FPSC Complaint* at 6, para. 8 (AT&T was required to migrate STS's UNE-P base of customers "in a profitable manner in compliance with the section 227 of the *TRRO*"); *id.* at 5, para. 5 (AT&T "refused or was unable to transition STS's embedded base of customers in a timely manner to [STS's commingled] network"); *id.* at 13, para. 48 (AT&T had no "Bulk Migration in place to convert the embedded base through the commingling rules of the *TRRO*").

¹⁹ *See, e.g.*, Joint Statement at 19–20, paras. 75–76.

²⁰ *See* Ex. App. in Support of AT&T's Answer to STS's Formal Compl., Vol. 2, Exhibit 37 (Sept. 18, 2009) (on file in EB-09-MD-008).

²¹ *See* AT&T's Amended Answer to STS's Formal Complaint, Ex. App., Tab 33 (attaching the ICA) (Sept. 18, 2009) (on file in EB-09-MD-008) (Answer).

²² *See* Joint Statement at 45, para. 178; STS's Reply to AT&T Amended Answer and Legal Analysis to Formal Complaint at 64, para. 129 (Sept. 28, 2009) (on file in EB-09-MD-008) (Reply); AT&T's Legal Analysis at 9 (Sept. 24, 2009) (on file in EB-09-MD-008) (AT&T Legal Analysis).

²³ *See* Answer Ex. App., Tab 40 at 3, paras. 5–6 (Settlement Agreement). For the reasons stated in the *Order*, we reject STS's argument that the language in the Settlement Agreement stating that STS had withdrawn the 2006 *Proceedings* "without prejudice" means that the Settlement Agreement does not bar claims based on post-release conduct. *Order*, 28 FCC Rcd at 4348, para. 35 & n.106. *See* Motion for Reconsideration at 14–15.

²⁴ *See* Settlement Agreement at 3, paras. 5–6.

²⁵ *Id.* at 2–3, para. 8.

10. After the Settlement Agreement and ICA were executed, AT&T migrated approximately 85 of STS's existing UNE-P customers to the commingled arrangement using SL2 loops.²⁶ STS alleges that the migration process was slow, unwieldy and expensive, and that STS's customers suffered outages and other inconvenience.²⁷

11. STS sought to address these issues by filing suit against AT&T in the United States District Court for the Northern District of Florida (District Court). STS's District Court complaint alleged that AT&T had breached the Settlement Agreement by failing to convert the 2500 lines, that AT&T had fraudulently induced STS to enter the Settlement Agreement, and that AT&T had violated the ICA.²⁸ The District Court dismissed the claim for breach of the ICA, ruling that the terms of the ICA designated the Florida PSC as the appropriate forum for that claim.²⁹ The court also dismissed STS's fraudulent inducement claim, holding that STS could not have reasonably relied on AT&T's alleged misrepresentations in entering into the Settlement Agreement because the parties were in adverse positions at the time the alleged misrepresentations were made.³⁰

12. Following these rulings, STS voluntarily dismissed its District Court Complaint and filed the instant Complaint with the Commission.³¹ The Complaint here alleges that AT&T violated Sections 201(a), 201(b), 202(a), 251(c)(1), 251(c)(2), 251(c)(3), and 271(c)(2)(B) of the Act by refusing to permit STS to commingle special access with SL1 loops and requiring STS to purchase the higher-priced SL2 loops instead, and by intentionally misrepresenting that the commingling of SL1 loops was technically infeasible.³² The Complaint further alleges that AT&T violated Sections 202(a) and 251(c)(2)(C) of the Act by failing to provide "seamless conversions" of STS's UNE-P customers to the commingled network through use of a bulk migration process.³³

13. In the *Order*, the Enforcement Bureau found that all of these claims were barred by the parties' Settlement Agreement and dismissed the Complaint in its entirety.³⁴ Specifically, the *Order* concluded that by executing the Settlement Agreement in conjunction with the ICA, STS had released any rights it had under the Act regarding services that were the subject of the 2006 Proceedings, including the commingling of SL1 loops and the bulk migration of lines, except through enforcement of the Settlement Agreement or the ICA.³⁵ The *Order* further concluded that STS should pursue any efforts to enforce its commingling or migration rights under the ICA before the Florida PSC, the parties' chosen forum for dispute resolution.³⁶ STS challenges the *Order* on several grounds, discussed below. For the reasons explained, we find that STS's arguments lack merit and deny STS's Motion in full.

²⁶ See Joint Statement at 35, para. 133. The parties disagree as to why STS's remaining UNE-P customers have not been migrated. *Compare* Compl. at 50, para. 143 (AT&T's migration process was so unworkable that STS "stop[ped] the project"), with Answer at 54, para. 131 ("AT&T could have completed the [migration] project if STS had genuinely cooperated in good faith.").

²⁷ See Compl. at 35–50, paras. 91–136, 140–143.

²⁸ See *Order*, 28 FCC Rcd at 4341–42, paras. 17–19; Joint Statement at 35–36, para. 138.

²⁹ See *Order*, 28 FCC Rcd at 4341–42, paras. 17–19. Joint Statement at 35–36, paras. 138–39.

³⁰ See *Order*, 28 FCC Rcd at 4342, para. 18; Joint Statement at 35–36, paras. 138–39.

³¹ See *Order*, 28 FCC Rcd at 4342, paras. 18–19.

³² See Compl. at 68–72, 74, 81, 83–84, 93, paras. 205, 208, 211, 214, 217, 220, 249, 252, 255, 293.

³³ See *id.* at 91–92, paras. 279, 282.

³⁴ See *Order*, 28 FCC Rcd at 4344, para. 23, 4353, para. 45.

³⁵ See *id.*, 28 FCC Rcd at 4344–53, paras 23–45.

³⁶ See *id.*, 28 FCC Rcd at 4530–31, paras. 37, 40 & n.121.

III. DISCUSSION

A. STS Settled its Claim that AT&T Did Not Negotiate the ICA in Good Faith.

14. STS's Complaint asserts at Count XIII that AT&T violated Section 251(c)(1) of the Act by failing to negotiate the ICA in good faith. STS alleged in its Complaint that it is technically feasible to commingle SL1s with special access transport such as the SmartRing, and that AT&T made an intentional misrepresentation when, during negotiation of the ICA, it stated that such commingling was not feasible.³⁷ We affirm the Enforcement Bureau's decision to dismiss this claim. The *Order* correctly found that the claims in Count XIII concerning AT&T's alleged misrepresentations and bad faith were barred by the Settlement Agreement's Release because they "relate to" claims that STS "asserted" or "could have [] asserted" in the *2006 Proceedings*.³⁸

15. In addition, we agree with the Bureau's finding that STS's Count XIII claims are also barred by language in the Settlement Agreement, which states that STS would not "re-file the allegations raised in or associated with the [2006 Proceedings]." ³⁹ Despite this promise, STS makes essentially the same allegations in Count XIII that it made in the *2006 Proceedings*. For example, just as STS alleges in its Complaint that AT&T's refusal to provide SL1 commingling violates the law, STS alleged in the *2006 Proceedings* that "the FCC in its *TRO* . . . required the commingling [of SL1s]," and described AT&T's refusal to commingle SL1s as "arbitrary," and in "flagrant disregard for the law."⁴⁰ Similarly, STS alleged in the *2006 Proceedings* that AT&T's claim of infeasibility was an intentional or reckless misrepresentation, and described AT&T's refusal to provide SL1s as an act of "bad faith" negotiation aimed at driving STS out of business.⁴¹ Because the Settlement Agreement bars STS from reasserting here allegations raised in or associated with the *2006 Proceedings*, we find that the *Order* correctly dismissed Count XIII.⁴²

16. STS argues in its Motion for Reconsideration that AT&T's conduct in negotiating the ICA was not covered by the Settlement Agreement's release language because negotiation and execution of the ICA was a condition of the settlement Term Sheet the parties negotiated months before they executed the ICA.⁴³ STS does not assert, and the record contains no persuasive evidence, that the parties continued to negotiate about commingling SL1s after they signed the Term Sheet. Indeed, the Term Sheet establishes that the parties had resolved their dispute over SL1s no later than the date of its execution, because the Term Sheet declares that AT&T will provide "SL2 loops commingled with special access transport," and that "STS agrees to withdraw its current bill disputes regarding the delta between SL1 and SL2 rates."⁴⁴ In any event, regardless of whether negotiations over SL1s continued after the

³⁷ See, e.g., Compl. at 93–95, paras. 285–92 (Count XIII). See also Motion for Reconsideration at 8, 21–22 (arguing that AT&T violated Section 251(c)(1) of the Act).

³⁸ See *Order*, 28 FCC Rcd at 4345, para. 26.

³⁹ Settlement Agreement at 3.

⁴⁰ See, e.g., *supra* notes 15–16.

⁴¹ See, e.g., *supra* note 16.

⁴² STS contends that the *2006 Proceedings* did not discuss the negotiation of the ICA. See Motion for Reconsideration at 16 n.28, 20. On the contrary, the parties' negotiation of the ICA's terms, including STS's SL1 request, began prior to the *2006 Proceedings*, are described in the *2006 Proceedings*, and culminated in the ICA. See Compl. at 93, para. 285 (ICA negotiations began in March 2006), Compl., Affidavit of Keith Kramer, Ex. 1 at KK00208–09 (March 2006 email from Keith Kramer, STS, to Mark Amarant, STS) (describing discussions with AT&T about "the new proposed ICA").

⁴³ See Motion for Reconsideration at 8, 12, 20. See also *Order*, 28 FCC Rcd at 4347, para. 32 & nn.96–97 (rejecting earlier STS argument regarding Term Sheet).

⁴⁴ Term Sheet at 1.

Term Sheet was signed, we conclude, as the *Order* found, that STS resolved its claim that AT&T failed to negotiate the ICA in good faith when, after executing the ICA, STS entered into the Settlement Agreement.⁴⁵

17. STS also argues in its Motion for Reconsideration that the Settlement Agreement is “void” and “unenforceable” because it allows AT&T to “continue to violate [the Act]” by refusing to provide SLIs and bulk migration.⁴⁶ On the contrary, the Settlement Agreement does not excuse any AT&T violations of the Act after the date of the Settlement Agreement, but, as discussed below, settles mature claims, and as such is favored by the law.⁴⁷

B. STS Settled its SL1 and Bulk Migration Claims.

18. STS’s Complaint further alleges that AT&T was obligated under the Act to commingle SLIs with STS’s special access SmartRing, and to provide a “seamless” bulk migration process for converting STS’s customers from UNE-P. Specifically, STS alleged that AT&T’s refusal to do so violated Sections 201, 202, 251(c), 271(c) of the Act.⁴⁸ We agree with the Enforcement Bureau that STS released its claims that AT&T was required to commingle SLIs and to provide for “seamless” bulk migration of STS’s customers, except to the extent the ICA and Settlement Agreement provide for such commingling and migration, and we affirm the Bureau’s decision to dismiss these claims. In the Settlement Agreement, STS agreed to release “all . . . Claims, whether known or unknown, asserted or which could have been asserted, against [AT&T] related to the [2006 Proceedings].”⁴⁹ STS also agreed

⁴⁵ Because we find that STS settled its Count XIII Section 251(c)(1) claim, we do not address AT&T’s defense that this claim is time-barred. *See Order*, 28 FCC Rcd at 4353 n.131. In addition, we assume without deciding that STS may bring a Section 251(c)(1) claim here even though STS did not believe or rely on AT&T’s alleged misrepresentations regarding technical infeasibility, and yet did not invoke the Section 252(b) state commission mediation process in the face of doubts about the validity of AT&T’s representations. *See id.*, 28 FCC Rcd at 4346 n.91 (concluding that STS did not believe AT&T’s assertion that SLIs could not be commingled); *supra* notes 15–16 (STS alleged, in the 2006 Proceedings, that AT&T’s refusal to provide SLIs was, among other things, fraudulent).

⁴⁶ *See* Motion for Reconsideration at 8, 21–22 (arguing that “when an agreement allows or requires a party to violate the law, such agreements are void”). The cases on which STS relies are distinguishable because they do not involve settlement agreements resolving mature claims. *See* Motion for Reconsideration at 21–22, nn.41–45 (*citing Voicestream Wireless Corp. v. U.S. Commc’ns, Inc.*, 912 So.2d 34 (Fla. 4th DCA 2005) (commercial contract waived entitlement to statutory remedies for future violations of state franchise law); *Local No. 234 of United Ass’n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 66 So.2d 818, 821 (Fla. 1953) (closed shop agreement between union and employers unenforceable as against Florida public policy); *AT&T Corp. Country Direct Service Agreement with Telecomm. Internacionales de Argentina*, Memorandum Opinion and Order, 11 FCC Rcd 13893 (Int’l Bur. 1996) (agreement requiring AT&T to violate Commission resale rules after the agreement’s execution is void); *App’n of Algreg Cellular Engineering*, Order Designating Applications for Hearing and Order to Show Cause, 6 FCC Rcd 2921, 2926, para. 23 (Common Carrier Bur. 1991) (sanctioning parties to agreements to violate Commission cellular licensing rules). The final case relied on by STS also is distinguishable, as it involves an agreement settling claims for violations accruing after the date of the agreement. *See* Motion for Reconsideration at 22, n.45 (*citing Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp.2d 561, 577–78 (E.D. Pa. 2001) (rejecting proposed release in class action settlement as overbroad because it waived claims for future violations of antitrust law that were not based on the practices at issue in the litigation before the court)).

⁴⁷ *See, e.g., Fidelity and Guaranty Ins. Co. v. Star Equip’t Corp.*, 541 F.3d 1, 5 (1st Cir. 2008) (“Settlement agreements enjoy great favor with the courts ‘as a preferred alternative to costly, time-consuming litigation.’”) (citations omitted); *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034, 1039 (9th Cir. 2011) (analyzing a party’s attempt to set aside a settlement agreement for fraud in light of the principle that “[t]here are . . . very important policies that favor giving effect to agreements that put an end to the expensive and disruptive process of litigation.”).

⁴⁸ *See* Compl. at, e.g., 81–86 (Counts VII through X).

⁴⁹ *See* Settlement Agreement at 3, paras. 5–6.

that it would not “re-file the allegations raised in or associated with the [2006 Proceedings]” in any forum.⁵⁰ STS claimed in the 2006 Proceedings that AT&T was obligated to commingle SL1s with the SmartRing and to provide a method for transitioning STS’s customers to STS’s commingled network in a timely manner, and that AT&T’s failure to do so violated the Act.⁵¹ Applying that release provision, the Order correctly found that by executing the Settlement Agreement in conjunction with the ICA, the parties intended that STS would give up any right it had to insist on the commingling of SL1 loops and the bulk migration of customers, except to the extent such services were provided for in the Settlement Agreement or the ICA.⁵²

19. STS attempts to escape this conclusion by arguing that the Settlement Agreement only applies to AT&T’s conduct before the Settlement Agreement was executed, and does not relieve AT&T of liability for its refusal to provide SL1 commingling or bulk migration after the agreement’s execution.⁵³ STS misunderstands the law. STS relies on cases in which a party unsuccessfully argued that a settlement agreement discharged its liability for a cause of action arising after the date of the settlement agreement.⁵⁴ These cases have no bearing here because STS’s claims that AT&T was obligated to provide SL1 commingling and a process for timely migration of customers accrued before the Settlement Agreement was signed. Courts have widely upheld settlements of federal statutory claims where the claims accrued before the settlement was executed.⁵⁵ The record here establishes that STS’s claims that AT&T was obligated to provide SL1 commingling and an effective means of migrating customers had accrued no later than June 2006, when STS raised these issues in the 2006 Proceedings. These claims thus accrued before the Settlement Agreement was executed in November 2006 and are subject to its release provisions.

⁵⁰ *Id.* at 3.

⁵¹ *See, e.g., FPSC Complaint* at 4, para. 5 (AT&T is in breach of the TRO’s commingling requirements); *id.* at 16, para. 62 (the Commission “require[s]” commingling of SL1s with special access transport, and AT&T’s “refusal” to provide STS with SL1s violates the TRO); *FCC Comments* at 13, para. 41 (the Commission “require[s]” commingling of SL1s with special access facilities); *id.* at 13, para. 43 (AT&T’s refusal to provide SL1’s to STS violates the TRO); *FPSC Complaint* at 6, para. 8 (AT&T was required to migrate STS’s UNE-P base of customers “in a profitable manner in compliance with the section 227 of the TRRO”); *id.* at 5, para. 5 (AT&T “refused or was unable to transition STS’s embedded base of customers in a timely manner to [STS’s commingled] network”); *id.* at 13, para. 48 (AT&T had no “Bulk Migration in place to convert the embedded base through the commingling rules of the TRRO.”).

⁵² *See Order*, 28 FCC Rcd at 4350–51, paras. 37, 40.

⁵³ *See, e.g., Motion for Reconsideration* at 11.

⁵⁴ *See Motion for Reconsideration* at 7–8, 9–15 (citing *Farese v. Scherer*, 2009 WL 1065894 (S.D. Fla. 2009) (release does not apply to fraudulent acts committed after release’s execution)), *Cain v. Banka*, 932 So.2d 575 (Fla. 5th DCA 2006) (a release signed at motocross track did not bar a personal injury claim arising from an accident years later because the clause did not clearly state that it covered all future visits to the track)).

⁵⁵ *See, e.g., Korn v. Franchard Corp.*, 388 F. Supp 1326, 1329 (S.D.N.Y. 1975) (“To . . . foreclose the parties from settling matured claims . . . [would] force every claimant to pursue the litigation to its costly conclusion This would constitute a blow not only to judicial economy, but to justice and common sense as well.”); *Northern Oil Co., Inc. v. Standard Oil Co.*, 761 F.2d 699, 707 (Temp. Emer. Ct. App. 1985) (en banc) (release bars federal statutory claim that “accrued prior to execution of the release,” because “[t]his case does not invoke the policy concerns inherent in the situation where a release purports to allow a knowingly guilty party to violate federal law in the future”); *Goodman v. Epstein*, 582 F.2d 388, 402 (7th Cir. 1978) (“Section 29(a) of the Securities Exchange Act of 1934 [which provides, ‘Any . . . stipulation . . . binding any person to waive compliance with any provision of this chapter . . . shall be void’] does not bar a release or settlement of an existing, matured claim, but only ‘anticipatory waivers of compliance with the provisions of the . . . Act.’”) (citations omitted). *See also LocaFrance U.S. Corp. v. Intermodal Systems Leasing, Inc.*, 558 F.2d 1113, 1115 (2d. Cir. 1977) (“It is well established that federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action.”) (citations omitted).

C. STS Must Bring Any Actionable Post-Settlement Agreement Commingling and Migration Claims Before the Florida PSC.

20. The Complaint alleges that the migration processes AT&T employed following the Settlement Agreement were so defective as to impair STS's ability to commingle any DS-0 loops with special access transport.⁵⁶ STS charges AT&T with violating its obligations under Sections 251(c)(2) and (3) of the Act to provide interconnection and nondiscriminatory access to UNEs, and its obligations under Section 271(c)(2)(B)(i) and (ii) of the Act to comply with Section 251(c)(2) and (3).⁵⁷ STS also claims that AT&T's post-settlement migration and comingling failures violate Sections 201(a) and (b) and 202(a) of the Act.⁵⁸ The *Order* correctly found that by entering into the Settlement Agreement and ICA, STS released these statutory claims and the parties agreed that STS's rights to migration processes or comingling arrangements would be governed by the terms of the ICA and the Settlement Agreement.⁵⁹ Accordingly, under the parties' settlement, STS must pursue any actionable post-Settlement Agreement claims through enforcement of the ICA.⁶⁰

21. Further, wholly apart from the terms of the parties' settlement, by entering into the ICA in November 2006, STS waived any rights it might have had under Sections 251 or 271 of the Act to insist on comingling or migration terms different from those set forth in the ICA. The duty to provide a UNE, such as a DS-0 loop, or a migration service, under Section 251(c)(2) and (3) is not self-executing, but takes effect only to the extent it is incorporated into an agreement pursuant to Section 252 of the Act.⁶¹ A LEC may waive its Section 251(c) rights by entering into an interconnection agreement under Section 252 that provides for a different resolution than specified by Section 251(c) and the Commission's implementing rules.⁶² Accordingly, STS's Section 251(c)(2) and (3) claims may succeed only if AT&T is in breach of the ICA. Likewise, because STS's Section 271(c)(2)(B)(i) and (ii) claims are premised entirely on AT&T's alleged violation of Section 251(c)(2) and (3), these claims, too, can succeed only if AT&T has breached the ICA.

22. STS admits that the ICA does not obligate AT&T to provide SL1 comingling.⁶³ As noted in the *Order*, the parties disagree about the scope and meaning of the ICA's migration provisions.⁶⁴ STS contends in its Complaint and in its Motion for Reconsideration that the ICA requires AT&T to provide bulk migration of STS's embedded customer base, a position that AT&T disputes.⁶⁵ The *Order* concluded that any dispute about the scope of the ICA's migration provisions should be brought before

⁵⁶ See, e.g., Compl. at 86–92, 121, paras. 261–278, 388.

⁵⁷ See *id.* at 68 (Count I); *id.* at 72–74 (Counts V and VI); *id.* at 91 (Count XI).

⁵⁸ See *id.* at 69–72, 92–93, paras. 208–216, 282–84.

⁵⁹ See *Order*, 28 FCC Rcd at 4530–31, paras. 37, 40 & n.121.

⁶⁰ As noted above, STS previously sought enforcement of the Settlement Agreement's provision regarding the migration of 2500 lines through an action in the United States District Court for the Northern District of Florida.

⁶¹ Subsection 251(c)(1) of the Act states that incumbent LECs must “negotiate . . . agreements to fulfill the duties [to interconnect and provide UNEs],” and subsections (c) (2) and (3) states that interconnection and UNEs are provided “in accordance with the . . . agreement.” See 47 U.S.C. § 251(c)(1), (3) (emphasis added).

⁶² Section 252(a) of the Act permits the parties to “enter into an agreement without regard to the standards set forth in . . . section 251[(c)].” 47 U.S.C. § 252(a).

⁶³ See Joint Statement at 45, para. 178; Reply at 64, para. 129. As noted in the *Order*, although the ICA, as drafted, does not provide for SL1 comingling, it contains a “Bona Fide Request” (BFR) process that allows STS to request that AT&T provide comingling of elements not currently eligible for comingling, and to seek resolution before the Florida PSC if it is not satisfied with AT&T's response. *Order*, 28 FCC Rcd at 4351, para. 40 & n.121.

⁶⁴ *Order*, 28 FCC Rcd at 4351, para. 40 & n.121.

⁶⁵ See Motion for Reconsideration at, e.g., 4, 11, 17; AT&T Legal Analysis at 9.

the Florida PSC under the terms of the ICA's forum selection clause.⁶⁶ We agree. The ICA states:

[I]f any dispute arises as to the interpretation of any provision of this Agreement or as to the proper *implementation* of this Agreement, the aggrieved Party, if it elects to pursue resolution of the dispute, shall petition the [Florida PSC] for a resolution of this dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the [PSC]. . . .⁶⁷

23. STS contends in its Motion for Reconsideration that, even if the forum selection clause applies, it should not be enforced because the Florida PSC does not have jurisdiction over STS's Section 271(c)(2)(B)(i) and (ii) claims.⁶⁸ Yet a forum selection clause should be enforced "absent a compelling reason not to do so."⁶⁹ We see no compelling reason here. STS's Section 271(c)(2)(B)(i) and (ii) claims are based entirely on AT&T's alleged failure to comply with Section 251(c)(2) and (3). Any violations under 251(c) may be adjudicated by bringing an action before the Florida PSC. Thus, this is not "a dispute that lies at the core of [the Commission's] enforcement mission," as distinct from the enforcement mission of the PSC.⁷⁰ Indeed, Section 252, which authorizes state commissions to mediate, arbitrate and approve interconnection agreements, demonstrates that Congress intended state commissions to play an active and important role in ensuring compliance with the local competition provisions of the Act.⁷¹ Further, STS's claim is not one that "inevitably touches commercial relations among many participants in

⁶⁶ See *Order*, 28 FCC Rcd at 4351, para. 40 & n.121 (citing record materials). See also *id.* at 4530, para. 37.

⁶⁷ Answer Ex. App. Tab 33 (ICA) at § 8. It is clear that the forum selection clause applies to STS's claims. AT&T is liable under Section 251(c)(2) and (3) of the Act (and therefore, Section 271(c)(2)(B)(i) and (ii) of the Act) only if it is in breach of the ICA. Accordingly, these claims fall squarely within the language of the forum selection clause, for they are a "dispute . . . as to the proper implementation of this [ICA]." We disagree with STS's contention that the forum selection clause applies only to disputes as to whether AT&T is in breach of the ICA, and so does not apply to the present dispute, which is whether AT&T is in violation of statute. See, e.g., Compl. at 97, para. 298. The forum clause refers to "any dispute" as to the ICA's proper implementation, regardless of whether that dispute also concerns an alleged statutory violation. See Answer Ex. App. Tab 33 (ICA) at § 8 (emphasis added).

⁶⁸ See, e.g., Motion for Reconsideration at 6, 8, 21–22, Compl. at 68, para. 206 (citing 47 U.S.C. § 271(c)(2)(B)(i), (ii)); Reply at 57–63, paras. 121–27.

⁶⁹ *MAP Mobile Commc'ns, Inc. v. Illinois Bell Tel. Co.*, Memorandum Opinion and Order, 24 FCC Rcd. 5582, 5588, para. 18 (Enf. Bur. 2009) (citations omitted). See *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 213–214 (4th Cir. 2007) ("a forum-selection clause is 'prima facie valid,'" but may be set aside "if enforcement would contravene a strong public policy of the forum in which suit is brought.") (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

⁷⁰ *MAP Mobile Commc'ns*, 24 FCC Rcd at 5588, para. 18.

⁷¹ See *MCI Telecom. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000) (describing state commissions as "deputized federal regulator[s]" charged with enforcing the local competition provisions of the Act). That "the dispute involves the application of contract language to particular facts" is another factor weighing in favor of enforcing the forum selection clause. See *MAP Mobile Commc'ns*, 24 FCC Rcd at 5588, para. 18.

STS does not argue that the Florida PSC is unable or unwilling to protect STS's rights under the ICA. See *MAP Mobile Commc'ns, Inc.*, 24 FCC Rcd at 5588, para. 18 (a factor in determining whether to honor a forum selection clause is whether the litigation in the parties' chosen forum would "be a waste of time"). The Florida PSC approved the ICA and is familiar with local network conditions, and therefore is better able than the Commission to determine the nature and extent of AT&T's obligation to migrate STS's customers to a commingled network. In fact, during the pendency of this case, STS and AT&T were engaged in proceedings before the Florida PSC involving a review of AT&T's processes for ordering commingled arrangements and bulk migration. See Saturn Telecommunications Services, Inc.'s Unopposed Motion to File Supplemental Documentation (May 25, 2010) (on file in EB-09-MD-008). Moreover, the forum selection clause provides for judicial review of any decision by the PSC.

the relevant industry.”⁷² AT&T states that STS is the only competitive LEC anywhere in AT&T’s entire 22-state region that has ever asked to commingle SL1 or SL2 loops with special access transport, and STS provides no persuasive evidence to the contrary.⁷³ In sum, this dispute does not raise federal concerns sufficient to disregard a valid forum selection clause, and we decline to disrupt the parties’ forum choice.

24. Finally, we note that in addition to being released under the parties’ Settlement Agreement, STS’s allegations that AT&T’s alleged post-settlement migration and commingling failures violated Sections 201(a) and (b) and 202(a) of the Act must be denied for failure to state a claim.⁷⁴ As the Commission has long recognized, “sections 201 and 202 of the Act are concerned with ‘interstate communication’ or ‘foreign communication’ by a ‘common carrier’ as those terms are defined in section 3 of the Act”⁷⁵ Yet STS has alleged violations of Sections 201(a) and (b) and 202(a) of the Act without identifying any basis for those claims other than AT&T’s alleged failure to comply with its unbundling obligations. The Commission has held that “the provision of an unbundled network element is not the provision of a telecommunications service.”⁷⁶ Nor do STS’s allegations otherwise explain how the claimed violations of Sections 201 or 202 arise from actions for or in connection with an interstate or foreign service within the scope of those statutory provisions. STS does not allege that AT&T is in breach of its interstate tariff or that it provisioned any foreign or interstate service or facility in an unlawful manner. As a result, STS’s Section 201 and 202 claims must be denied on the independent ground that they fail to state a claim under those statutory provisions.

D. STS’s Motion to Open Proceedings is Without Merit.

25. STS has filed a motion asking this Commission to investigate “the impartiality of the [Enforcement Bureau] proceedings and the appearance of impartiality.”⁷⁷ STS notes that the Chief of the Enforcement Bureau’s Market Disputes Resolution Division (MDRD) during the initial stages of the MDRD proceeding was subsequently employed by AT&T. STS also notes that AT&T’s lead counsel at the first conference in the proceeding subsequently became the Commission’s General Counsel. Finally, STS is concerned because, before joining the Commission many years ago, the Chief of the Enforcement Bureau at the time the *Order* was released was a partner in a law firm that represented AT&T on other matters.

⁷² *MAP Mobile Commc’ns*, 24 FCC Rcd at 5588, para. 18 (listing factors to be considered in determining whether to honor a forum selection clause).

⁷³ See Declaration Appendix in Support of AT&T’s Answer to STS’s Formal Complaint, Milner Dec’l, 3, 7, para. 17 (Sept. 18, 2009) (on file in EB-09-MD-008). The record does not support STS’s assertion that a Kentucky competitive LEC sought to commingle SL1s or SL2s with special access transport, as that carrier sought a switch port, not special access transport. See Reply at 7–8, 61 (*citing* Compl., Ex. 4 (Samry Aff.)). STS’s bare assertion that other LECs “would have been interested” if AT&T had developed a workable process for migrating UNE-P customers to a commingled arrangement using SL2s, Reply at 62, must be dismissed as speculative. STS states that it would have expanded beyond Florida if AT&T had been able to migrate STS’s customers efficiently. See Compl. at 112, para. 349. Yet STS effectively admits that that no such expansion was possible given the rates for SL2s. See Compl. at 27 (complaining of SL2 rates); *FPSC Complaint* at 10, para. 35 (same).

⁷⁴ See, e.g., Compl. at 69–72, 92–93, paras. 208–216, 282–84.

⁷⁵ *TPI Transmission Services, Inc. v. Puerto Rico Tel. Co.*, Memorandum Opinion and Order, 4 FCC Rcd. 6479, 6479, para. 5 (1989).

⁷⁶ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services In Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20595, para. 95 (1997).

⁷⁷ Motion for Reconsideration at 5 (*citing* 47 C.F.R. § 1.1 (Commission may investigate “any matter . . . for the purpose of obtaining information necessary or helpful in . . . the carrying out of its duties”).

26. We conclude that the Enforcement Bureau proceeding was conducted in an impartial manner, and that there is no appearance of impartiality. The Enforcement Bureau and agency ethics staff with knowledge of the facts confirm that both the former Chief of MDRD and the FCC General Counsel complied fully with applicable Office of Government Ethics recusal requirements in this matter. In particular, the MDRD Chief promptly and properly followed the Commission's job-seeking recusal requirements, disqualifying himself from all AT&T matters, including this proceeding, upon being contacted by AT&T regarding potential employment. The Commission's General Counsel had no involvement in this proceeding whatsoever after coming to the Commission. Further, this individual is no longer with the Commission. With respect to the former Chief of the Enforcement Bureau, after consultation with agency ethics officials, we conclude that, the fact that the bureau chief was, 18 years before, a partner in a firm that represented AT&T on other matters, would not cause a reasonable person to question her impartiality in this matter, and thus no recusal on her part was warranted. Moreover, this individual is no longer in the Enforcement Bureau.

27. Accordingly, **IT IS ORDERED**, pursuant to Sections 1, 4(i), 4(j), 201, 202, 208, 251, 252, 271, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, 208, 251, 252, 271, and 405, and Sections 1.1, 1.106, and 1.302 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.106, and 1.302, that the Motion for Reconsideration is **DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary